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(23)

No. 05-1256

FILED
SEP 15 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

PHILIP MORRIS USA,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

**On Writ Of Certiorari To
The Supreme Court Of Oregon**

BRIEF OF HENRY H. DRUMMONDS, CAROLINE FORELL, KATHY T. GRAHAM, LAIRD C. KIRKPATRICK, RONALD B. LANSING, SUSAN F. MANDIBERG, JAMES MOONEY, AND DOMINICK R. VETRI, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

STEVEN C. BERMAN
STOLL STOLL BERNE LOKTING
& SHLACHTER PC
209 SW Oak Street
Suite 500
Portland, OR 97204
(503) 227-1600
Counsel of Record

DAVID F. SUGERMAN
PAUL & SUGERMAN, PC
520 SW Sixth Avenue
Suite 920
Portland, OR 97204
(503) 224-6602

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

This *amicus* brief addresses generally the first question that the Court accepted for review.

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I. INTRODUCTION

A. Statement of Interest of *Amici Curiae*

Oregon is home to three law schools: Lewis and Clark Law School, University of Oregon School of Law, and Willamette University School of Law. *Amici curiae* Henry H. Drummonds, Professor of Law, Lewis and Clark Law School; Caroline Forell, Clayton R. Hess Professor of Law, University of Oregon School of Law; Kathy T. Graham, Associate Dean for Academic Affairs and Professor of Law, Willamette University College of Law; Laird C. Kirkpatrick, Orlando John & Marion H. Hollis Professor of Law, University of Oregon School of Law; Ronald B. Lansing Professor of Law, Lewis and Clark Law School; Susan F. Mandiberg Professor of Law, Lewis and Clark Law School; James Mooney, Wallace & Ellen Kaapcke Professor of Business Law, University of Oregon School of Law; Dominick R. Vetri, B.A. Kliks Professor of Law, University of Oregon School of Law (collectively "the Oregon Professors *amici*") are professors from Oregon's law schools. The Oregon Professors *amici* have no financial interest in the outcome of this case. However, as Oregonians and academics who educate the next generation of Oregon lawyers and judges, the Oregon Professors

amici have a strong interest in preserving and protecting the integrity and reputation of the Oregon courts.[1]

The Oregon Professors *amici* file this brief to refute the unfounded and misplaced arguments asserted by *amici curiae* Oregon Forest Industries Council, Oregon Grocers Association, National Federation of Independent Business/Oregon Chapter, Oregon Restaurant Association, Associated Oregon Industries, and Strategic Economic Development Corporation (the "Oregon Industry *amici*"). In particular, the Oregon Professors *amici* address the Oregon Industry *amici*'s mischaracterization of the Oregon appellate judiciary as rogue courts that "ignore or avoid" the Court's jurisprudence regarding post-verdict review of punitive damages awards. Oregon Industry *amici* Brief at 17. The Oregon appellate courts have adhered faithfully to the jurisprudence set forth in *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994) and its progeny. In this case and the handful of other post-*Oberg* cases involving post-verdict review of jury punitive damage awards addressed by the Oregon appellate courts, those courts have applied the law properly to ensure that no defendant is denied due process of law. There is no basis for the Oregon Industry *amici*'s unfounded assertion that the Oregon appellate courts are "not listening" to "what this Court has tried to do to limit large punitive damages awards over the last 20 years." Oregon Industry *amici* Brief at 16.

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[1] Through counsel, the Oregon Professors *amici* certify: 1) no counsel for any party wrote all or any part of this brief; 2) the Oregon Trial Lawyers' Association made a monetary contribution to fund the costs of printing and serving this brief; and 3) pursuant to Rule 37.3(a), all parties have consented to this brief. Letters establishing consent have been lodged with the Clerk of the Court.

B. Summary of Argument

The Oregon courts have faithfully followed and applied this Court's emerging due process jurisprudence as it relates to the adjudication of punitive damage claims. In response to this Court's decision in *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994), the Oregon Supreme Court overruled inconsistent case law and limited the application of State constitutional prohibitions on re-examination of jury verdicts. In the same era, the Oregon Legislative Assembly enacted a host of statutory reforms designed to codify clear and explicit standards for the adjudication and review of punitive damage awards.

Much of what troubles the Oregon Industry *amici* is a lack of historical understanding. The current state of the law did not spring in whole from the *Oberg* case. Instead, the Court's jurisprudence has developed and emerged, and the lower courts have acted in response. The Oregon courts have remained faithful to the various standards as they have developed.

Cases that span changes in this Court's jurisprudence highlight the dynamic. Two cases provide the best illustration: *Bocci v. Key Pharmaceuticals, Inc.*, 158 Or. App. 521, 974 P.2d 758 (1999), *vacated and remanded*, 332 Or. 39, 22 P.3d 758, *on remand*, 178 Or. App. 42, 35 P.3d 1106 (2001), *cert. granted, vacated and remanded*, 538 U.S. 974 (2003), *on remand*, 190 Or. App. 407, 79 P.3d 908 (2003); and *Waddill v. Anchor Hocking, Inc.*, 175 Or. App. 294, 27 P.3d 1092 (2001), *rev. den.*, 334 Or. 260, 47 P.3d 486 (2002), *cert. granted, vacated and remanded*, 538 U.S. 974 (2003), *on remand*, 190 Or. App. 172, 78 P.3d 570 (2003). Both were originally

decided by Oregon appellate courts applying the standards set forth in *BMW v. Gore*, 517 U.S. 559 (1996). Both were on appeal for so long that the law changed midstream with this Court's later case of *State Farm v. Campbell*, 538 U.S. 408 (2003). And in both cases, the Oregon courts ultimately applied *Campbell* and reduced the punitive damages on remand.

It appears that Oregon Industry *amici* want a fixed ratio that sets an outer limit on punitive damage awards. With good reason, this Court has declined set such a rigid limit in the past. Nothing in the Oregon Industry *amici* brief suggests any basis for departure from the Court's view that punitive damages should not be limited to a fixed ratio.

II. ARGUMENT

A. Introduction

According to Oregon Industry *amici*, the Oregon Supreme Court and Court of Appeals are ignoring this Court's due process jurisprudence relating to punitive damages. The argument rests on a selective view of history and case law. As this Court has developed its punitive damages due process jurisprudence, the Oregon courts have responded by adopting and applying the developing case law. Oregon Industry *amici* use this fantastic image of a "rogue court" in order to encourage this Court to do what it repeatedly said it would not and that is to set a fixed limit ratio on punitive damages awards. The arguments are without merit, as the Oregon courts have remained faithful to due process requirements in this decade of changing law.

B. The Oregon Appellate Courts Have Adhered Strictly to this Court's Application of the Due Process Clause to Post-Verdict Review of Punitive Damages Awards.

1. *Oberg* and the Oregon Supreme Court's Response

The Court's determination that the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States requires post-verdict review for excessiveness of a jury's award of punitive damages arose out of the Oregon Supreme Court's decision in *Oberg v. Honda Motor Co., Ltd.*, 316 Or. 263, 851 P.2d 1084 (1993). In *Oberg*, the plaintiff had suffered extensive injuries as a result of the defendants' negligent manufacturing, distributing and selling of an inherently and unreasonably dangerous product. A jury awarded the plaintiff $919,390 in compensatory damages and $5,000,000 in punitive damages. 316 Or. at 266, 851 P.2d at 1086. On appeal, the Oregon Supreme Court rejected the defendants' argument that they were entitled to post-verdict review, for excessiveness, of the jury's punitive damages award. 316 Or. at 275-289, 851 P.2d 1091-1099.

The Court granted *certiorari* and reversed. 512 U.S. 415 (1994). The Court began its analysis by recognizing that "[e]very other State in the Union affords postverdict judicial review of the amount of a punitive damages award." 512 U.S. at 427-428. The Court stated that Oregon's "lonely eminence is this regard" was an "abrogation of a well-established common law protection against arbitrary deprivations of property" that presumptively resulted in a due process violation. 512 U.S. at 427 (internal quotation marks omitted; citations omitted). The Court concluded that other extant Oregon law safeguards intended

to ensure against improper deprivations of property failed to meet the requirements of due process. 512 U.S. at 432-433. In *Oberg*, the Court specifically acknowledged that it was not addressing the "more difficult question of what standard of review is constitutionally required." 512 U.S. at 432 n.10. However, the Court endorsed the standard it previously had articulated as a due process requirement for review of criminal punishments in *Jackson v. Virginia*, 443 U.S. 307, 324 (1979), "whether no rational trier of fact could have reached the same verdict." *Oberg*, 512 U.S. at 432, n.10.

On remand, the Oregon Supreme Court conducted a post-verdict review of the jury's punitive damages award and applied the rational juror standard explicitly stated by the Court. *Oberg v. Honda Motor Co., Ltd.*, 320 Or. 544, 551, 888 P.2d 8, 12 (1995) ("*Oberg II*"). The court concluded that the punitive damages award was within the range that a reasonable juror could award and affirmed the jury's punitive damages verdict. 320 Or. at 555, 888 P.2d at 14. The defendants' petition for *certiorari* was denied. *Honda Motor Co., Ltd. v. Oberg*, 517 U.S. 1219 (1996).

Oberg II led to a fundamental change in Oregon State constitutional law. To give effect to this Court's rulings, the Oregon Supreme Court overruled in part longstanding State constitutional precedent. *Oberg II*, 320 Or. at 548-49, 888 P.3d at 10 (*overruling in part, Van Lom v. Schneiderman*, 187 Or. 89, 210 P.2d 461 (1949)). In the same case, the Oregon Supreme Court held that the Oregon Constitution's prohibition on re-examination of jury findings could not be applied to punitive damage awards in light of Fourteenth Amendment Due Process limits articulated by this Court. *Oberg II*, 320 Or. at 548-49, 888 P.3d at 10.

In their brief, the Oregon Industry *amici* harshly criticize the Oregon Supreme Court and the Oregon Court of Appeals for their post-*Oberg* application of the "rational juror" standard. *See, e.g.*, Oregon Industry *amicus* Brief at 6 (referring to this Court's "rational juror" standard as "very deferential" and the Oregon Supreme Court's application of that standard as "*Oberg II*'s rule of complete deference to jury awards"). The Oregon Industry *amici* assert that the Oregon Supreme "[C]ourt's message to trial courts was clear: defer to the jury's punitive damages decisions." Oregon Industry *amici* Brief at 7. The Oregon Industry *amici* overlook the fact that the Oregon Supreme Court and Oregon Court of Appeals were applying the legal standard this Court set forth in *Oberg*.

2. *Oberg* and the Oregon Legislature's Response

After the Oregon Supreme Court adopted this Court's "rational juror" standard for post-verdict review of punitive damages awards, the Oregon Legislative Assembly enacted additional limitations regarding how and when punitive damages could be awarded. In the wake of *Oberg*, the Oregon legislature codified specific standards for recovery of punitive damages and court review of punitive damage awards. 1995 Or. Laws, ch. 688, § 2.[2] Codifying longstanding common law standards, the statute limits punitive damages to cases in which a plaintiff proves by clear and convincing evidence that a defendant "has acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has

[2] Originally codified at Or. Rev. Stat. § 18.537; renumbered in 2003.

acted with a conscious indifference to the health, safety and welfare of others." Or. Rev. Stat. § 31.730.[3] All jury awards of punitive damages must be reviewed by the trial court "to determine whether the award is within the range of damages that a rational juror would be entitled to award based on the record as a whole." Or. Rev. Stat. § 31.730(2). Finally, an award of punitive damages may be reduced, if it is determined to be excessive, or if a defendant establishes that the defendant has taken "reasonable" remedial measures to prevent reoccurrence of the conduct that gave rise to the claim for punitive damages. Under such circumstances, the reviewing court must consider any previous punitive damages awards against the same defendant for the same conduct. Or. Rev. Stat. § 31.730(3).

But the protections are much broader than the statutory review provisions. Plaintiffs cannot state a claim for punitive damages without leave of the court. Or. Rev. Stat. § 31.725(2). Before allowing a party to seek punitive damages, the trial court must conclude that sufficient admissible evidence exists such that a jury could find that the defendant acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others. Or. Rev. Stat. § 31.725(2) and § 31.730(1). Further, a plaintiff seeking punitive damages may not obtain discovery of the financial condition of the defendant until it has met the preliminary burden. Or. Rev. Stat. § 31.725(6).

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[3] Oregon's clear and convincing standard *exceeds* the requirements of due process. *Pacific Mutual Life Ins. Co. v. Haslip*, 449 U.S. 1, 23 n.11 (1991).

The statutory revisions come on the heels of pre-existing requirements that apply in civil cases. The broad protections include specific criteria in product liability cases that must be set forth in jury instructions in punitive damage cases. Or. Rev. Stat. § 30.925(2). Further, no plaintiff may pursue damages in excess of the amounts sought in the prayer in the complaint. *See Wiebe v. Seely Administrator*, 215 Or. 331, 357, 335 P.2d 379 (1959); Or. R. Civ. P. 18B. Finally, judicial review of the sufficiency of the evidence supporting the claim for punitive damages remains in effect. The Oregon courts will vacate punitive damage awards that lack evidentiary support. *See, e.g., Northwest Natural Gas Co. v. Chase Gardens*, 328 Or. 487, 490-491, 982 P.2d 1117, 1120 (1999).

After the Court's decision in *Oberg*, both the Oregon appellate courts and legislature critically examined Oregon law and acted to ensure that Oregon law complied with the requirements of the Due Process Clause. The Oregon requirements far exceed due process standards in that they attach before filing, during the case, and after verdict.

The Oregon Industry *amici*'s attempt to portray Oregon as a state where a defendant "risks excessive punitive damages jury awards without any recourse to constitutionally required meaningful appellate review" (Oregon Industry *amici* Brief at 17) falls flat. Oregon law provides extensive protections to defendants before, during and after trial.

3. Oregon Law in the Post-*Gore* Era

The Oregon Industry *amici* argue that Oregon appellate courts have ignored the standards set in *BMW v. Gore*, 517 U.S. 559 (1996) and instead have hewed a

unique Oregon standard. The argument requires suspension of critical thinking, both historical and legal. For years, this Court articulated no standards that applied to lower court review of punitive damage claims. The first statement of any standard – *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) – provided limited guidance to the States. As this Court's jurisprudence developed, it used later cases to more explicitly delineate the standards. *See, e.g.*, *Gore*, 517 U.S. at 568 (certiorari granted "to illuminate" standards that identify constitutionally excessive awards).

Oregon Industry *amici* cite a handful of cases considered by the Oregon appellate courts after this Court decided *Oberg*. Oregon Industry *amici* Brief at 6-15. Discussing those cases, and looking only at the ratio of punitive damages to actual damages, the Oregon Industry *amici* erroneously conclude that no "meaningful post-verdict review of punitive damages awards" occurs in Oregon. *Id.* at 11. The cases do not support the Oregon Industry *amici*'s argument. Each of the cases demonstrates that the Oregon appellate courts have adhered to the guidance provided by this Court.

In the era between *Gore* and *State Farm v. Campbell*, 538 U.S. 408 (2003), the Oregon appellate courts diligently applied the *Gore* standards in the cases that came before them. Although the Oregon Industry *amici* claim to be distraught by the Oregon appellate courts' analyses in those cases, what Oregon Industry *amici* truly are upset about are the results. The Oregon Industry *amici* cite a number of cases in the interim period between *Gore* and *Campbell* and suggest that something is wrong with how the Oregon appellate courts decided those cases. Even before *State Farm*, virtually all Oregon cases met the

presumptively acceptable single-digit multiplier standard discussed by the Court years later. *See, e.g.*, *Lakin v. Senco Products, Inc.*, 329 Or. 62, 83-84, 987 P.2d 463, 475-476 (1999) (ratio of punitive damages to compensatory damages less than 1:1); *see also Purcell v. Asbestos Corp. Ltd.*, 153 Or. App. 415, 959 P.2d 89 (1998), *rev. den.*, 329 Or. 438, 994 P.2d 126 (1999) (ratio of less than 2:1); *Axen v. American Home Products Corp.*, 158 Or. App. 292, 974 P.2d 224, *adhered to on recons.*, 160 Or. App. 19, 981 P.2d 340, *rev. den.*, 329 Or. 357, 994 P.2d 124, *cert. den.*, 528 U.S. 1136 (2000) (plaintiff blinded by dangerous drug; ratio less than 10:1); *Kraemer v. Harding*, 159 Or. App. 90, 976 P.2d 1160, *rev. den.*, 329 Or. 357 (1999) (school bus driver falsely accused of sexually abusing students; ratio less than 1:1); *MacCrone v. Edwards Center, Inc.*, 160 Or. App. 91, 980 P.2d 1156 (1999), *vacated and remanded*, 332 Or. 41, 22 P.3d 758, *adhered to on remand*, 176 Or. App. 355, 31 P.3d 513 (2001), *rev. den.*, 334 Or. 190 (2002) (plaintiff left to endure assault and strangulation by patient at care center; supervisor refused to provide assistance or protection; ratio less than 5:1); *Cantua v. Craeger*, 169 Or. App. 81, 7 P.3d 693 (2000) (statutory employment discrimination and sex harassment claim with ratio of 20:1; however, compensatory damages for lost earnings totaled $500, with punitive damages of $10,000).

4. Oregon Law Post-*Campbell*

The Oregon Industry *amici*'s emphasis on pre-*Campbell* cases diminishes their argument, for account must be taken of how the Oregon courts applied *Campbell*. The Oregon Industry *amici* make much of *Parrott v. Carr Chevrolet, Inc.*, 156 Or. App. 275, 965 P.2d 440 (1998), *rev'd.*, 331 Or. 537, 17 P.3d 473 (2001), and the pre-*Campbell* cases

of *Bocci v. Key Pharmaceuticals, Inc.*, 158 Or. App. 521, 974 P.2d 758 (1999), *vacated and remanded*, 332 Or. 39, 22 P.3d 758, *on remand*, 178 Or. App. 42, 35 P.3d 1106 (2001), *cert. granted, vacated and remanded*, 538 U.S. 974 (2003), *on remand*, 190 Or. App. 407, 79 P.3d 908 (2003) (vacated for reconsideration in light of *Campbell*; punitive damages reduced on remand to ratio of 7:1); *Waddill v. Anchor Hocking, Inc.*, 175 Or. App. 294, 27 P.3d 1092 (2001), *rev. den.*, 334 Or. 260, 47 P.3d 486 (2002), *cert. granted, vacated and remanded*, 538 U.S. 974 (2003), *on remand*, 190 Or. App. 172, 78 P.3d 570 (2003) (vacated for reconsideration in light of *Campbell*; punitive damages reduced on remand to 4:1 ratio).

The argument fixates on the past. In fact, the Oregon courts have faithfully applied the due process standards and have responded appropriately as this Court articulated the standards. More important, the argument discards facts that do not fit. As the Oregon Supreme Court explained in the opinion under review, its opinion in *Parrott* was superseded in part by *Campbell*. *Williams v. Philip Morris, Inc.*, 340 Or. 35, 55, 127 P.3d 1165, 1177 (2006). The Oregon Industry *amici* invite this Court to act based upon legal history that does not represent the current state of Oregon law. At issue is whether Oregon law and the Oregon courts comport with due process requirements. They do.

The Oregon Industry *amici* argue that punitive damages jury decisions "are rarely disturbed (and have never been disturbed by the Oregon Supreme Court)." Oregon Industry *amici* Brief at 15. The argument is overstated in several respects. First, punitive damages are rare enough that few cases qualify for consideration. More to the point, roughly half of the punitive damages jury

verdicts appealed in Oregon after *Gore* have been reduced or reversed by the Oregon appellate courts. *See, e.g., Bocci*, 189 Or. App. 349, 76 P.3d 669 (2003) (personal injury case where plaintiff was awarded $500,000 in actual damages and Court of Appeals reduced $22.5 million punitive damages award to $3.5 million); *Waddill*, 190 Or. App. 172, 78 P.3d 570 (personal injury case where the plaintiff incurred $134,472 in actual damages and Court of Appeals reduced $1 million punitive damages award to $403,416); *Goddard v. Farmers Insurance Co. of Oregon*, 202 Or. App. 79, 120 P.3d 1260 (2005), *rev. granted*, __ Or. __, __ P.3d __ (September 6, 2006) (Court of Appeals holding that, in a personal injury case, punitive damages award of $20 million was excessive when actual damages were $863,274 and holding that a 3:1 ratio was the maximum that could comport with due process based on the facts of that case). *See also Stranahan v. Fred Meyer*, 331 Or. 38, 11 P.3d 228 (2000) (on the plaintiff's appeal of the trial court's reduction of punitive damages from $2 million to $375,000, where actual damages were $125,000, Oregon Supreme Court reversed the underlying jury verdict on other grounds).

Oregon Industry *amici*'s arguments disintegrate in the face of the decided cases. Oregon courts repeatedly have established that they do in fact act to reduce punitive damage awards that are excessive.

The Oregon Industry *amici*'s criticism of the Oregon Supreme Court is misguided in another respect. The Oregon Supreme Court is, with exceptions not relevant here, a court of discretionary review. ORAP 9.05. The Oregon Supreme Court will not review a lower court's decision unless a party files a petition for review and successfully articulates an issue of significance beyond the facts of the case that merits review. ORAP 9.07; ORAP

9.20. Oregon Industry *amici* overstate their argument when they proclaim that punitive damage awards, "have *never* been disturbed by the Oregon Supreme Court. . . ." Oregon Industry *amici* Brief at 15 (emphasis in the original). But in at least four cases that they argue support the proposition, the defendants did not seek review of the award.[4] The Oregon Supreme Court could not act in those cases, and thus the universe of cases contracts. In another three cases where review was denied by the Oregon Supreme Court, the punitive damages awarded were well within the single-digit ratio subsequently deemed presumptively constitutional by this Court in *Campbell*.[5] In the cases where review was sought and denied, it is not clear whether the defendant raised the issue of excessiveness of the award of punitive damages.

At bottom, Oregon Industry *amici* dislike the result in *Williams*. The record demonstrates that Philip Morris' conduct is breathtakingly reprehensible and destructive. The Oregon Industry *amici* would not deliberately engage in conduct of this nature. For that reason, the critique that they offer is somewhat hard to fathom. The lesson of *Williams* is simple: a rogue corporate entity that exploits

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[4] Those cases are: *Cantua v. Creager*, 169 Or. App. 81, 7 P.3d 693 (2000), *Blume v. Fred Meyer, Inc.*, 155 Or. App. 102, 963 P.2d 700 (1998), *Bocci* and *Waddill*.

[5] Those cases are: *MacCrone v. Edwards Center, Inc.*, 176 Or. App. 355, 31 P.3d 513 (2001) (upholding a 4.5:1 punitive damages ratio), *review denied*, 334 Or. 190, 47 P.3d 485 (2002); *Kraemer v. Harding*, 159 Or. App. 90, 976 P.2d 1160 (upholding a 0.6:1 punitive damages ratio), *review denied*, 329 Or. 357, 994 P.2d 124 (1999); *Purcell v. Asbestos Corporation, Ltd.* (1998) (upholding a 1.67:1 punitive damages ratio), *review denied*, 329 Or. 438, 994 P.2d 126 (1999).

biological frailties in the human species may be punished when its misconduct causes widespread disease and death.

The Oregon Professors *amici* are not aware of any Oregon industry that knowingly and intentionally has shown such a callous disregard for human life and welfare as the tobacco industry and its market leader, Philip Morris. Under Oregon and federal law, responsible corporate citizens cannot be subjected to punitive damages awards similar (either in size, or as a ratio to actual damages) to the award made in this case. Businesses are not threatened by the verdict in this case.

C. The Oregon Industry *Amici*'s Push for Definitive Ratios is Inconsistent with the Court's Jurisprudence.

The gravamen of the Oregon Industry *amici*'s brief is that Oregon law "exposes businesses in the state to arbitrary and unreasonable punitive damages awards, particularly in product liability cases." Oregon Industry *amici* Brief at 16. From that premise, the Oregon Industry *amici* demand that the Court set a definitive ratio of punitive damages to compensatory damages.

The Court repeatedly has rejected the rule proposed by the Oregon Industry *amici*, that due process requires a defined ratio or cap between compensatory damages and punitive damages. In *Pacific Mutual Life Ins. Co. v. Haslip*, 449 U.S. 1, 18 (1990), the Court explained "we *cannot* [] draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." (Emphasis added). In *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460 (1993) the Court again reiterated that it has

"eschewed an approach that concentrates entirely on the relationship between actual and punitive damages" and upheld a punitive damages award that exceeded by a factor of 526 the plaintiffs' actual damages. In *Gore*, the Court recognized that "we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award" and "reiterated our rejection of a categorical approach." 517 U.S. at 582. But, the Court also acknowledged that in a non-personal injury case, a 500:1 ratio of punitive damages to actual damages was one potential indicia of excessiveness. *Gore*, 517 U.S. at 583. It was not until the recent decision in *Campbell* that the Court began to articulate with specificity a loose outer range for punitive damage awards in most (but not all) cases. The Court again "decline[d] . . . to impose a bright-line ratio which a punitive damages award cannot exceed." However, after examining its prior jurisprudence, the Court observed that "*few* awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process." 538 U.S. at 425 (emphasis added). The Court explicitly stated that "these ratios are *not binding*, they are instructive." *Id.* at 425 (emphasis added). Nonetheless, the Court concluded that "single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution than awards with ratios in the range of 500 to 1 or, in this case, of 145 to 1." *Id.* at 425 (emphasis added; citations omitted).

What the Court repeatedly has said regarding ratios is that they may provide guidance as to whether an award of punitive damages is constitutionally permissible. There is no bright line. As Judge Posner properly recognized in

Mathias v. Accor Economy Lodging, Inc., 347 F.3d 672, 677 (7th Cir. 2003), adherence to a bright-line ratio would "enable the defendant to commit the offensive act with impunity provided that he was willing to pay." With a bright-line ratio restricting punitive damages, a tortfeasor would do what Philip Morris did in Oregon for decades and weigh the benefits of selling an addictive drug that, when properly used, causes extensive and extreme health risks against the possible costs of a restricted judgment against it. Punitive damages are intended to prevent product manufacturers from weighing potential financial profits against loss of human health and, in the case of Philip Morris, human life. An award of punitive damages "thus serves the additional purpose of limiting the defendant's ability to profit from its fraud by escaping detection and (private) prosecution." *Id.* at 677.

The Oregon Industry *amici*'s apparent dispute with the Oregon appellate courts is that those courts do not remit every punitive damages verdict in every case that comes before them. However, post-verdict review does not insure post-verdict reduction.[6]

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[6] Oregon Industry *amici* imply that the uncertainties arising from punitive damage exposure threaten Oregon businesses. Oregon Industry *amici* Brief at 3). To the contrary, the Oregon economy is healthy, with steady employment and better-than-expected tax revenues. Due to the State's healthy economy, the citizens and businesses of Oregon are scheduled to receive tax refunds at unprecedented levels. "Oregon's IOU to Taxpayers: $1.3 billion," *The Oregonian*, at 1, col. 1 (Sept. 1, 2006).

III. CONCLUSION

Oregon Industry *amici* got it wrong. The Oregon courts have remained faithful to this Court's evolving punitive damage due process jurisprudence.

Oregon Industry *amici* inexplicably seek to defend corporate misconduct that is indefensible. It is difficult, if not impossible, to come up with comparisons when assessing the fraud at issue in this case. No other segment of the legal market economy has intentionally manipulated an addictive substance to build and maintain its business, and few other businesses have worked so hard to conceal their misconduct. In that respect, the scope of the misconduct is incomparable. This Court should affirm the judgment.

Dated this 15th day of September, 2006.

Respectfully submitted,

STEVEN C. BERMAN
STOLL STOLL BERNE LOKTING & SHLACHTER PC
209 SW Oak Street
Suite 500
Portland, OR 97204
Telephone: (503) 227-1600

DAVID F. SUGERMAN
PAUL & SUGERMAN, PC
520 SW Sixth Avenue
Suite 920
Portland, OR 97204
Telephone: (503) 224-6602

Attorney for Amici